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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 171

WILLARD SAXBY TOWNSEND, ET AL.,
Petitioners,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3, 19-21
Statement	3
Summary of argument	6
Argument	8-18
I. (Fair Labor Standards Act of 1938)	8
II. (Illinois anti-tipping statute)	14
III. (Railway Labor Act)	16
Conclusion	18
Appendix (Statutes involved)	19-21

Citations.

CASES.

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 12
Gloyd v. Hotel La Salle Co., 221 Ill. App. 104 14
J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332 17
Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342 17
Page v. Arkansas Natural Gas Corp., 286 U. S. 269 13
Southern Ry. Co. v. Black, 127 F. 2d 280 13
Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515 13
Williams v. Jacksonville Terminal Co., 315 U. S. 386 .....4, 6, 8, 9, 13, 15, 18

STATUTES.

Fair Labor Standards Act of 1938 (52 Stat. 1060, 1062, 1069; 29 U. S. Code, secs. 203, 206, 216):
Sec. 3 (e) and (g) 19
Sec. 6 (a), (1) and (2) 2, 3, 4, 5, 6, 8, 11, 12, 15, 19
Sec. 16 (b) 6, 8, 11, 19
Illinois anti-tipping statute (June 29, 1915, Illinois Laws, 1915, p. 385; Ill. Rev. Stat. 1943, c. 38, Criminal Code, pars. 551-553) 3, 6, 14-16, 20
Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925 (43 Stat. 938; 28 U. S. Code, sec. 347) 2
Railway Labor Act (48 Stat. 1186, 1197; 45 U. S. Code, secs. 152, 156) 3, 7, 16-18, 20

MISCELLANEOUS.

Federal Rules of Civil Procedure, Rule 52(a) (U. S. Code, title 28, following sec. 723c) 9
Hart, The Business of the Supreme Court at the October Terms, 1937 and 1938, (1940), 53 Harvard Law Review, 579, 595, note 28 12
Rules of Supreme Court (Rule 38).....2, 14, 16, 18

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Opinions Below.

The memorandum opinion of the District Court of the United States, Northern District of Illinois, Eastern Division, has not been reported; but it is set out in the record, together with the findings of fact, conclusions of law, and judgment (R. 748-751 and 755-756).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 141 F. 2d 483.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered March 16, 1944. The petition for a writ of certiorari was filed June 16, 1944. The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 938; U. S. Code, title 28, sec. 347).

Petitioners have failed, in several respects, to comply with the rules of this Court (Rule 38, pars. 2 and 3):

1. Notice of the filing of the petition was not received by counsel for respondents until the eleventh day after the filing.

2. The printed record was not served upon counsel for respondents within ten days after the filing of the petition. It was not received by them until July 22, 1944.

3. Respondents respectfully suggest that the petition does not contain "a summary and short statement of the matter involved," and that the supporting brief is not "direct and concise."

Questions Presented.

1. Whether the trial court's finding of fact, at the conclusion of the trial without a jury, to the effect that—

> "Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action,"

which finding of fact the Circuit Court of Appeals in its

opinion and by its judgment of affirmance held to be clearly supported by the evidence, should be further reviewed by this Court.

2. Whether this Court will review the judgment of the Circuit Court of Appeals to the effect that, under the Illinois decisions construing the Illinois anti-tipping statute (June 29, 1915, Illinois Laws, 1915, p. 385; Ill. Rev. Stat. 1943, c. 38, pars. 551-553), petitioners cannot recover tips accounted for to their respective employer-respondents under an accounting and guarantee plan, established at the effective date of Fair Labor Standards Act of 1938, which left all tips with petitioners and assured them that each would receive at least the minimum wages.

3. Whether this Court will review the judgment of the Circuit Court of Appeals merely because its opinion did not discuss a point with respect to the alleged invalidity, under the Railway Labor Act, of the accounting and guarantee plan as applied to the employees of only two of the eight respondents, when the point was not argued during the oral argument before the Circuit Court of Appeals, petitioners filed no petition with that court for a rehearing, and the record supports the trial court's finding that the plan was validly established by each of the respondents.

Statutes Involved.

The applicable statutes or portions of statutes involved are set forth in the Appendix, *infra*, pp. 19-21.

Statement.

The facts appearing in the record may be summarized thus:

Before the effective date (October 24, 1938) of the Fair Labor Standards Act of 1938, each of the respondents gave to each of the petitioners, then employed by it as redcap

porters at its passenger stations, as well as to all other redcap porters employed by it, a notice, identical in form with that considered by this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 392, establishing the identical accounting and guarantee plan there held valid (R. 575, 584, 594, 772, 784, 803, 813, 821). Each of the petitioners thereafter continued to work as a redcap for his respective employer-respondent, made a daily report of tips which he said he had received from passengers and, for each pay-period in which the tips so reported by him did not equal or exceed the minimum wage prescribed by Section 6 of the Fair Labor Standards Act, received payment for the deficiency from his employer-respondent (R. 576, 585, 595, 773, 785, 804, 814, 822).

Under the pleadings and the agreed statements of facts filed as to each of the respondents, it was open to each of the petitioners to prove, as he contended and the respondents denied, that in some instances he had reported that he had received more in tips from passengers than he had actually received. Of the 1091 petitioners, only 19 testified on the trial which, as before indicated, was by the court without a jury. None of the 19 introduced evidence as to any specific deficiency in any pay-period during the time covered by the action. The District Court said in its memorandum opinion:

> "On the trial only nineteen plaintiffs, employed by only four of the railroad companies, gave any testimony on the fact of reporting tips in a greater amount than were actually received, and this was not in actual dollars and cents. As to the remaining 1,072 employees there is no substantial evidence that they received less than the amounts which they reported. * * * I do not believe that plaintiffs have satisfactorily sustained the burden of proof on this question" (R. 749-750).

The District Court found as a fact from all the evidence, among other findings:

> "3. Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action" (R. 755).

The District Court concluded as a matter of law, among others:

> "3. The claim of each of the plaintiffs against his respective employer-defendant for unpaid minimum wages, for liquidated damages, for attorney's fee, and for costs of the action is without merit and should be denied" (R. 756).

The District Court therefore entered judgment that the plaintiffs have and recover nothing.

The Circuit Court of Appeals, after considering the case on briefs and oral argument, unanimously affirmed the judgment of the District Court (141 F. 2d 483, 486; R. 836, 837).

SUMMARY OF ARGUMENT.

I.

The only question of law in this case that is based on the Fair Labor Standards Act of 1938 has already been decided against petitioners' contention, in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. All the respondents had in effect during the period covered by this action the identical accounting and guarantee plan which this Court held valid in the *Williams* case.

The trial court, sitting without a jury, found as a fact that not one of the 1091 petitioners (of whom only 19 had testified) had proved that his employer-respondent had failed to pay him the minimum wages prescribed by the Act for any pay-period. The Circuit Court of Appeals held that the evidence supported the finding, and affirmed the judgment against the petitioners. Under such circumstances this Court will not grant a further review.

II.

The decision of the Circuit Court of Appeals with respect to the Illinois anti-tipping statute was correct. The court below pointed out that, by its own terms, the statute purported to cover only tips in addition to any regular rate of charge, whereas the petitioners' tips were the sole compensation for redcap service while the accounting and guarantee plan was in effect. Moreover the only Illinois decision construing the statute held that under similar circumstances an employee could not recover from his employer tips which he had currently surrendered to him.

III.

The opinion of the court below has not decided any question arising out of the Railway Labor Act; consequently, there is nothing in its opinion for this Court to review in that respect. Petitioners did not argue this point on the oral argument before the Circuit Court of Appeals. They did not file a petition for rehearing in that court. Having failed to exhaust their remedies in the court below, they are not in a position to ask this Court to grant them the discretionary remedy of certiorari. Moreover, the record supports the trial court's finding that the accounting and guarantee plan was validly established by each of the respondents.

ARGUMENT.

I.

The fundamental question of law involved in this case is based on the Fair Labor Standards Act of 1938; but that question has already been decided adversely to the contention of the petitioners in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. This Court there held that a railroad company operating a passenger terminal might credit against the minimum wage prescribed by that Act tips received by redcaps from passengers, when there had been established by notice an accounting and guarantee plan which left all tips with the redcaps and assured them that each would receive at least the minimum wage.

In the case at bar each of the respondents, by a notice identical with that in the *Williams* case, duly established the identical accounting and guarantee plan which this Court in that case held to be valid. The only difference in this respect between the *Williams* case and this case is that here, by the pleadings and the agreed statements of facts that were received in evidence with respect to all petitioners and respondents, there was left open to the petitioners an opportunity to prove, as they contended and the respondents denied, that in the reports that they had filed each day throughout the period of the accounting and guarantee plan they had in some instances reported more tips than they had actually received. In short, the difference is not one of law but of fact.

Practically all the testimony and other evidence introduced by the petitioners before the District Court on the trial without a jury, with the exception of the agreed state-

ments of facts, was offered in the attempt to prove the alleged fact of over-reporting tips. Yet only 19 out of 1091 petitioners (less than 1¾% of the whole number, and employed by only four of the eight respondents) offered any such testimony, and none of the 19 testified in dollars and cents to a deficiency in the minimum wage during any specific pay-period (R. 749, 755). Moreover, by cross-examination and by evidence introduced by them, the respondents sharply contested the testimony of the 19 petitioners on this point. After a full hearing the trial judge found the facts against the petitioners. Specifically he found that each of the petitioners had failed to prove by a preponderance of the evidence that the respondent that employed him had failed to pay him the minimum wages prescribed by the Act for any pay-period during the time covered by the Act (R. 755). This Court has declared in the rules which it promulgated for civil procedure in the District Courts:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnessess" (Rule 52(a), Federal Rules of Civil Procedure).

On the record in this case, the Circuit Court of Appeals said:

> "Since the recent decision in *Williams* v. *Jacksonville Terminal Co.* (*Jacksonville* and *Dallas* cases), 315 U. S. 386, there is little left for discussion or decision in the instant case. There, it was definitely decided that the Accounting and Guarantee Plan, 'which leaves all tips with the redcaps and assures them that [they] each would receive at least the minimum wage,' was valid; in other words, tips received by a redcap must be accounted for to the extent necessary to make up his minimum wage. The principal difference between the instant case and the *Jacksonville* case is that here plaintiffs had an opportunity under the pleadings and

agreed statements of facts to prove, if they could, that their tip reports were inaccurate in the manner alleged, namely, that they had not received in tips as much as they had reported to their respective employer-defendants'' (141 F. 2d 483, 484).

After pointing out that the issue presented was one of fact and that, of the 1,091 petitioners, only 19 were called as witnesses, the Circuit Court held:

> ''Furthermore, even though the court had found that the 19 plaintiffs who testified had reported tips in amounts greater than received, as a result of coercion or for any other reason, such a finding could not support a judgment as to the remaining 1,072 plaintiffs. In addition, the testimony of the plaintiffs who testified was speculative and uncertain as to any amount which that particular plaintiff reported over the amount received. We agree with the lower court that the burden was upon each plaintiff to prove the amount reported in excess of that received before that plaintiff would be entitled to judgment. All of the plaintiffs having failed to offer proof in this respect, it follows that none of them were entitled to judgment'' (141 F. 2d 483, 485).

Petitioners unjustly criticize the comment of the Circuit Court of Appeals ''that it would be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise'' (Brief, p. 23). This clause is quoted, out of context, from that portion of the Circuit Court's opinion that discussed the amount and kind of proof necessary to support petitioners' case. The immediate context of the Circuit Court's discussion is as follows:

> ''Under plaintiffs' stated theory of liability, this burden required plaintiffs to establish not only that excessive tips were reported, but the amount thereof, as well as the pay-period during which they were so reported. This is so, irrespective of the charge or proof concerning coercion, for the reason that it would

be immaterial whether the reporting of tips in excess of the amount received was the result of coercion, mistake or otherwise" (141 F. 2d 483, 485).

That is a correct statement of the law. Petitioners here sued under section 16(b) of the Fair Labor Standards Act for alleged liability for unpaid minimum wages, together with an additional equal amount as liquidated damages; but that section requires proof only of the fact of failure to pay the minimum wage, not the reason for non-payment. Thus the Circuit Court properly held that it was necessary for each petitioner to prove by a preponderance of competent evidence that, during one or more pay periods in the time covered by this action, he had not received from the respondent that employed him the minimum wages prescribed by section 6(a) of the Act, and the court also properly held that the reason for the alleged deficiency was immaterial.

The Circuit Court continued, after explaining that as to four respondents "there is not a scintilla of proof in support of the allegation that redcaps employed by these railroads reported tips in excess of those actually received":

> "As to the remaining defendants, the matter of coercion was a sharply controverted question which the trial court evidently resolved against the plaintiffs. Moreover, this question of coercion is rather incidental to the main issue. After all, the question for decision below was whether the plaintiffs or any of them proved that they had not received the minimum compensation provided by the Act. On this issue, the court found:
>
> > 'Each of the plaintiffs has failed to prove by a preponderance of the evidence that his respective employer-defendant failed to pay him the minimum wages prescribed by Section 6 of the Fair Labor Standards Act of 1938 * * * for any pay-period during the time covered by this action.'
>
> "The sole question here is whether that finding is substantially supported by the record" (141 F. 2d 483, 484).

The Circuit Court concluded that the evidence fully supported the finding.

From the foregoing examination of the opinion of the Circuit Court of Appeals, it is apparent that petitioners are seeking to induce this Court to review the evidence and to reconsider findings of fact made by the District Court after trial without a jury, and held by the Circuit Court to be substantially supported by the evidence. According to the established practice of this Court, however, a writ of certiorari will not be granted merely to review an issue of fact, where no question of law is involved. For instance, in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, this Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. * * * Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. * * * There is evidence to support them."

The Court's practice concerning questions of fact in certiorari petitions is thus described in the words of a former Chief Justice:

> "Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. * * * This at once disposes of a vast number of factual controveries where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves" (Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938* (1940), 53 Harv. L. Rev. 579, 595, note 28).

No unsettled issue of law under the Fair Labor Standards Act being involved in the instant case, and both courts below having resolved the factual issues in respondents'

favor, this Court will not grant a further review. *Page* v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271; *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 542.

A subsidiary point urged by petitioners may be disposed of briefly. Although they brought this action as employees, petitioners now claim in this Court not only the right to receive in cash from their employer-respondents the full statutory minimum wage, but also the right to retain all tips on the theory that they are "volunteers" (Brief, pp. 26-27). They evolve this theory from two sentences quoted from the opinion of this Court in the *Williams* case, 315 U. S. 386, 398. The sentences are taken from that part of the opinion in which this Court reached the conclusion that, although the redcaps continuously protested the authority of the railroads to take over the tips, yet because they remained at work subject to the requirement of the accounting and guarantee notice, their protests were unavailing against the employers. This Court said:

> "Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads' credit so much of the tips as it affected. By continuing to work, a new contract was created" (315 U. S. 386, 398).

Of course, petitioners cannot be both volunteers and employees. A similar argument was rejected by the Circuit Court of Appeals for the Fourth Circuit in *Southern Ry. Co.* v. *Black*, 127 F. 2d 280, 283:

> "Plaintiffs cannot blow hot and cold. They cannot say that the service for which tips are received is employment within the meaning of the act and in the same breath deny that the tips, which by agreement are the only compensation for the service, are wages of that employment. Nor can they assert the control of defendants over the relationship for the purpose

of bringing themselves under the act and deny that control in so far as it relates to the tips, which they receive because of the relationship."

II.

Notwithstanding what petitioners say in their brief (pp. 29-32) concerning the importance of the decision of the Circuit Court of Appeals with respect to the so-called Illinois anti-tipping statute, it is evident that the Circuit Court has not "decided an important question of local law in a way probably in conflict with applicable local decisions" (Supreme Court Rule 38, par. 5(b)).

On the contrary, as appears from the opinion itself, the only Illinois decision brought to the attention of the court, *Gloyd* v. *Hotel La Salle Co.*, 221 Ill. App. 104, held under similar circumstances that an employee could not, by reason of anything contained in the Illinois statute, recover from his employer tips which he had currently surrendered to him (141 F. 2d 483, 485).

Petitioners in their brief (pp. 29-31) attempt to distinguish the *Gloyd* case from the case at bar with respect to the Illinois court's holding that the plaintiff could not recover because he was *in pari delicto* with the defendant; but the attempted distinction is without a legal difference. The Illinois court held that it would not enforce the return of the tips, and that is precisely the situation in this case, so far as the Illinois statute is concerned.

Furthermore, the Circuit Court of Appeals clearly demonstrated in its opinion that the statute relied on had, by its own terms, no application to the redcap tips because they were not, at the time the accounting and guarantee system was in effect, "tips, in addition to the regular, ordinary and published rate of charge for work performed, materials furnished or services rendered," in the words of the Illinois statute. The Circuit Court of Appeals said:

"Such tips were not, therefore, in addition to any

> published rate of charge, but were the sole compensation received by plaintiffs unless such tips failed to equal the minimum wage requirements, in which case defendants were required to pay such deficiency" (141 F. 2d 483, 485).

Petitioners also indicate that the Circuit Court of Appeals decided an important question concerning the relationship between state and federal law, that is, between the Illinois anti-tipping statute and the Fair Labor Standards Act. But with respect to this point the Circuit Court of Appeals held:

> "Defendants further contend that the Illinois provision is not controlling because it conflicts with the Fair Labor Standards Act as construed by the Supreme Court in the *Williams* case. In view of what we have said, we think it is unnecessary to consider or decide this contention" (141 F. 2d 483, 486).

The Circuit Court, therefore, had no occasion to consider the relation between these two statutes, because it held that, irrespective of the provisions of the Fair Labor Standards Act, the Illinois statute was not applicable to the petitioners' case since, as pointed out above in the quotation from the Court's opinion, the tips here involved were not "in addition to the regular, ordinary and published rate of charge for work performed" and were consequently not within the provisions of the state statute. If petitioners had demonstrated their right to recover by virtue of the state statute, considered without reference to the Fair Labor Standards Act, the Circuit Court would have gone on to consider the relationship and possible conflict between the state and federal statutes. The language of the Illinois statute itself, however, and the sole Illinois decision construing the statute, left no doubt, in the opinion of the Circuit Court, that the state statute lent no support to petitioners' case.

This Court is not called upon to grant certiorari merely for the purpose of reviewing the Circuit Court's obviously

correct appraisal of the Illinois anti-tipping statute and the Illinois decision construing it. The point, moreover, does not affect any of the petitioners except such as were employed in Illinois by only three of the eight respondents (Brief, p. 34).

III.

Petitioners complain because the Circuit Court of Appeals "failed even to discuss the effect of the existence of negotiated agreements respecting wages" (Brief, p. 32).

Since there is nothing whatever in the opinion of the Circuit Court of Appeals dealing in any way with the Railway Labor Act, that court has not "decided" any question concerning that Act. Consequently, it cannot be contended that the Circuit Court "has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court" (Supreme Court Rule 38, par. 5(b)).

The fact that the petitioners did not see fit to argue this point on the oral argument before the Circuit Court of Appeals is sufficient explanation of the fact that the point is not discussed in the opinion. Moreover, if petitioners believed that the Circuit Court of Appeals should have discussed the point under the Railway Labor Act now argued in this Court, their remedy was by a petition to the Circuit Court for a rehearing, so that the court below would have been afforded an opportunity, if it deemed it necessary, to discuss the point. By not exhausting their remedies in the Circuit Court of Appeals, petitioners have foreclosed themselves from the discretionary remedy of certiorari in this Court.

While it is true that the point with respect to the Railway Labor Act was mentioned in petitioners' brief in the Circuit Court of Appeals, it was answered fully in the respond-

ents' brief in that court. Petitioners did not see fit to file a reply brief or, as has been indicated before, to argue the point orally. However, on March 10, 1944, approximately two months after the oral argument on other phases of the case, petitioners filed with the Circuit Court their "Additional Suggestions," directing its attention to the recent decisions of this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, and *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.* On March 14, 1944, respondents filed an answer to the additional suggestions pointing out that the decisions had no application to the facts pertaining to the institution and operation of the accounting and guarantee plan by the two respondents against whom the allegation of violation of the Railway Labor Act is directed. Neither respondent attempted to avoid collective bargaining or sought to supersede or expand a collective bargaining agreement. Neither respondent did anything inconsistent with the agreements which they had entered into with some of their redcap employees (R. 788-792; 813, 814), but only adopted a plan of payment which assured each employee a wage not less than the minimum under the Fair Labor Standards Act. That plan took absolutely nothing away from the redcaps. It gave them something additional (R. 814).

The record itself in this case justifies the failure of the Circuit Court to discuss the point in its opinion. As to one of the two respondents, petitioners even failed to include the charge with reference to the Railway Labor Act in the statement of points relied upon (R. 760). As to both respondents, petitioners failed to show that any violation of the Railway Labor Act took place. The trial court found that the "accounting and guarantee plan was validly established and put into effect by each of the eight defend-

* On page 33 of their brief in this Court petitioners have said that these decisions were specifically called to the attention of the Circuit Court of Appeals. On March 16, 1944, the Circuit Court filed its opinion (R. 831).

ants herein on October 24, 1938, with respect to each of the plaintiffs * * *'' (R. 755). That finding is well supported by the record.

Conclusion.

The decision of the Circuit Court of Appeals was correct. There is no conflict with the decision of another Circuit Court of Appeals on the same matter. The Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions. The question of federal law decided by the Circuit Court of Appeals with respect to the Fair Labor Standards Act had already been settled by this Court in *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386. The Circuit Court of Appeals has not decided a federal question in a way probably in conflict with applicable decisions of this Court.

In short, there are no special and important reasons for reviewing the record of the court below. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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